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ANTI-ALIEN LAND LEGISLATION

The validity of state statutes preventing aliens ineligible to citizenship from acquiring interests in real property has long been a subject of debate. In recent years the question has increased in importance and timely interest. Since the passage of the California Act,[1] the first of its kind, in 1913, several states have passed similar legislation, either directly declaring that aliens ineligible to citizenship cannot acquire any interest in realty or requiring a declaration of intention to become a citizen as a condition precedent to the privilege.[2] Under several earlier state statutes an alien not becoming naturalized within a certain period forfeits any interest he may have acquired.[3] At least three states have

[1] Calif. Laws, 1913, ch. 113; Deering's Calif. Gen. Laws, 1915, Act 129, at p. 40.

[2] Arizona—Act approved February 26, 1921; California—Alien Land Law, Act of Nov. 2, 1920 (aliens ineligible may not acquire land, omitting three-year provision of former act); Delaware—Act of April 7, 1921, amending Del. Rev. Code, ch. 91; Texas—Rev. Civ. Sts. 1911, tit. 3, amended by Act of April 1, 1921 (aliens who have declared their intentions to become citizens may acquire interest in lands); Washington—Laws, 1921, ch. 50.

[3] Illinois—Hurd's Rev. Sts. 1919, ch. 6, secs. 1, 2 (must become naturalized in

similar legislation pending.[4] These statutes remained unchallenged in the courts until the recent case of *Terrace v. Thompson* (1921, S. D. Wash.) 274 Fed. 841. The Washington state law[5] prohibited the purchase or lease of land by any alien who had not in good faith declared his intention to become a citizen. By federal statute certain Orientals are unable to be naturalized.[6] The plaintiff, Terrace, contrary to a penal provision in the state law, attempted to lease land to the plaintiff, Nakatsuka, a subject of Japan engaged in wholesale trading in farm products. Nakatsuka, being excluded from citizenship by the federal statute,[7] could not in good faith declare his intention to become a citizen. Both brought a bill to enjoin the Attorney-General from enforcing the state statute, alleging that it was contrary to the Fourteenth Amendment[8] and to a treaty with Japan.[9] The court held that the statute was constitutional and not in violation of the treaty.

Following the common-law rule that an alien may acquire land but not hold it except by tolerance of the state,[10] the United States, in fed-

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six years or forfeit land); Indiana—2 Burns' Sts. 1914, secs. 3943-44 (aliens owning over 320 acres must become naturalized in five years or property is forfeited). Both classes of legislation have the same practical effect on aliens ineligible to citizenship. Both shift the responsibility, in the final analysis, to the Federal Government. See also, Nebraska—Act of April 25, 1921, amending Neb. Rev. Sts. 1913, secs. 6273, 6275, 6276.

[4] The following states have proposed constitutional amendments affecting alien ownership of land. Colorado—Senate bill no. 142, session 1921; Louisiana—Substitute ordinance no. 452 approved by constitutional convention of 1921 (aliens ineligible prohibited from real property privileges); Nevada—Proposed repeal of art. 1 sec. 16 of Constitution which gives to foreigners, *bona fide* residents of the state, equal privileges with citizens as regards property. New Mexico—Joint Resolution Nov. 9, 1921, proposing amendment to art. 2, sec. 22, of state constitution (alien ineligible prohibited from real property privileges).

[5] Laws, 1921, ch. 50.

[6] "The provision of this title shall apply to aliens being free white persons and to aliens of African nativity and African descent." Act of July 14, 1870 (16 Stat. at L. 254, 255), corrected by Act of Feb. 18, 1875 (18 Stat. at L. 316, 318). For the reasons for excluding Asiatics see *In re Ah Yup* (1878, C. C. D. Calif.) 5 Sawyer, 155.

[7] See *supra*, note 6.

[8] U. S. Const. Amendments art. 14, sec. 1. ". . . . no state . . . . . shall deny to any person within its jurisdiction the equal protection of the laws."

[9] Treaty with Japan, Feb. 21, 1911 (37 Stat. at L. 1504). Art. 1: "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

[10] Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 86-88; 4 Moore, *International Law Digest* (1906) 34-38; 2 Blackstone, *Commentaries*, *249, *250; Coke, *Littleton*, 2 b. It is interesting, in view of the court's interpretation of the

eral territories,[11] and the respective states have always regulated alien ownership of real property within their borders and have lawfully prohibited all aliens from acquiring land.[12] A federal treaty is a limitation on this power, however, for, by the Constitution, it is the supreme law of the land,[13] on an equal footing with federal statutes,[14] but overriding state statutes.[15] The question of construing the Treaty with Japan was squarely presented to the court. Two points arose: (1) whether the privilege of acquiring agricultural lands was granted by the treaty; and (2) whether farming could be considered "necessary or incident" to trading in farm products so as to be covered by a clause of the treaty which entitled citizens of the contracting parties

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Treaty, to note the common-law distinction between a lease of a house and a lease of agricultural lands: "But as to a lease for years, there is a diversity between a lease for years of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like. For if he take a lease for years of lands, meadows, etc. upon office found, the king shall have it. But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandize or trade." Coke, *op. cit.* 2 b. See also 3 Tiffany, *Real Property* (1920 ed.) sec. 597.

[11] See Alaska Comp. Laws, Charlton Code, 1913. secs. 101, 101a, 254; Hawaii Rev. Sts. 1915, Organic Act, sec. 73. Acts regulating ownership of land by aliens in territories of the United States—Act of March 3, 1887 (24 Stat. at L. 476), amended by Act of March 2, 1897 (29 Stat. at L. 618).

[12] For compilation of state statutes see 4 Moore, *op. cit.* 33; *Alien Land Laws and Alien Rights* (1921) Doc. no. 89, 67th Cong. 1st Sess.

[13] U. S. Const. art. 6. As to limitation of treaty-making power, see NOTES (1919) 33 HARV. L. REV. 281.

[14] *The Cherokee Tobacco* (1870, U. S.) 11 Wall. 616, 621; *Whitney v. Robertson* (1888) 124 U. S. 190, 8 Sup. Ct. 456; cf. *United States v. Lee Yen Tai* (1902) 185 U. S. 213, 22 Sup. Ct. 629; *Ribas Y Hijo v. United States* (1904) 194 U. S. 315, 24 Sup. Ct. 727; cf. *Ex parte Gin Kato* (1920, W. D. Wash.) 270 Fed. 243. See 2 Butler, *Treaty-Making Power of the United States* (1902) sec. 378.

[15] Confiscation of alien debts by state statute: *Ware v. Hylton* (1796, U. S.) 3 Dall. 199; *Hopkirk v. Bell* (1806, U. S.) 3 Cranch, 454. Regulating inheritance by aliens: *Chirac v. Chirac* (1817, U. S.) 2 Wheat. 259; *Hauenstein v. Lynham* (1879) 100 U. S. 483; *Geofroy v. Riggs* (1889) 133 U. S. 258, 10 Sup. Ct. 295; *Schultze v. Schultze* (1893) 144 Ill. 290, 33 N. E. 201; *Bahuaud v. Bize* (1901, C. C. D. Neb.) 105 Fed. 485; *Dockstader v. Kershaw* (1903, Del.) 4 Pennw. 398, 55 Atl. 341; *Pierson v. Lawler* (1917) 100 Neb. 783, 161 N. W. 419; *Cohen v. Cohen* (1917) 47 App. D. C. 129; *Techt v. Hughes* (1920) 229 N. Y. 222, 128 N. E. 185. Ownership of land: *Tanner v. Staeheli* (1920, Wash.) 192 Pac. 991 (state statute not in conflict with treaty with Switzerland). Right to administration of alien's property: *McEvoy v. Wyman* (1906) 191 Mass. 276, 77 N. E. 379; *In Re Tartaglio's Estate* (1895, Surro.) 12 Misc. 245, 33 N. Y. Supp. 1121; *Hall v. Carpigianio* (1911) 172 Ala. 287, 55 So. 248. Taxation: *Moody v. Hagen* (1917) 36 N. D. 471, 162 N. W. 704, (a larger inheritance tax on aliens non-resident in the United States not in conflict with treaty with Norway). Cf. *Ex parte Terui* (1921, Calif.) 200 Pac. 954 (alien poll tax in conflict with treaty with Japan).

generally to do anything incident or necessary to trade upon the same footing as native citizens.[16]

Generally speaking, treaties are to be construed as a whole and in the light of past interpretations, and, if doubtful, to be construed liberally.[17] During the California land controversy[18] a series of notes was exchanged between the United States and Japan, the Secretary of State maintaining that the privilege to acquire agricultural lands was not granted by the treaty.[19] Following this construction, which though

[16] See *supra* note 9.

[17] *Hauenstein v. Lynham* (1879) *supra* note 15; *Sullivan v. Kid* (1920) 254 U. S. 433, 41 Sup. Ct. 158; cf. *Geofroy v. Riggs, supra* note 15. See 2 Butler, *op. cit.* 144-148.

[18] In 1913 California passed a statute (*supra* note 1) permitting aliens ineligible to citizenship to lease land for three years only. It gave rise to diplomatic correspondence between Japan and the United States, but the statute has apparently never been tested in the courts. Prior to this, in 1906, the San Fransicso School Board passed a resolution barring Japanese school children from the public schools. A suit was started to enjoin the enforcement of the ordinance on the ground that the provisions of the Treaty included the privilege of attending school. The case never reached a decision as the ordinance was withdrawn. For a discussion of this question see, Dilla, *Anti-Alien Land Bill* (1913) 12 MICH. L. REV. 573, 581; Baldwin, *Schooling Rights under our Treaty with Japan* (1907) 7 COL. L. REV. 85; Currey, *State v. Treaty Rights* (1912) 45 CHIC. LEG. NEWS, 340.

[19] In reply to Viscount Chinda's note of June 4th, 1913, claiming that the treaty gave the privilege of leasing realty and that the California Statute was in violation of the treaty, Mr. Bryan said in part, as regards agricultural lands:

"This treaty was based upon a draft presented by the Imperial Government. In Article 1 of this draft there is found the following clause:

"'3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (Art. 1) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops,' and 'to lease land for residential and commercial purposes.' It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes' and that the phrases 'industrial' and 'other lawful purposes' *which would have included the leasing of agricultural lands, were omitted*" (italics ours).

He later pointed out that Japan reserved the right to maintain, as regards land ownership, a condition of reciprocity towards the several states. He based this on the following note from Baron Uchida to Mr. Knox, of February 21, 1911:

"In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States . . . . . the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to American citizens from all states, reserving for the future, however, the rights of maintaining the condition of reciprocity with respect to the separate states."

Finally, in speaking of the California Statute, Mr. Bryan said:

"From what has been pointed out it appears to result, first, that the California

not binding, was at least strongly persuasive, the court answered the first question in the negative. In considering the second point the court said:

"In the most liberal construction of this language that may be indulged in, it cannot fairly be said that truck-farming is incident to trading . . . in the products of a farm any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry-goods trade."

This appears to be sound in view of the cases involving the incidental powers of a corporation.[20] One other circumstance should be noted. The absence of a favored-nation clause, applicable to land ownership, in the Treaty, precludes the enjoyment of any other privileges than those expressly granted.[21]

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statute, in extending to aliens not eligible to citizenship of the United States the right to lease land for a term not exceeding three years, may be held to go beyond the measure of privilege established in the treaty which *does not grant the right to lease agricultural lands at all . . . .*" (italics ours). See letter of Mr. Bryan to Viscount Chinda July 16, 1912. "Annex No. 7," pp. 17, 18. *Controversy—United States and Japan-California Question,* Congressional Library J V 6888 C 2 J 4.

[20] A railroad may lease a hotel at its terminus. *Jacksonville, M. P. Ry. & Nav. Co. v. Hooper* (1896) 160 U. S. 514, 16 Sup. Ct. 379. But the business of running a stage line is not incident to that of a railroad. Cf. *Hood v. N. Y., N. H. Ry.* (1852) 22 Conn. 1, 16, 502. Cf. *Dodge v. Ford Motor Co.* (1919) 204 Mich. 459, 498, 170 N. W. 668, 681 (power to smelt ore for its business included in corporate powers of automobile manufacturing); *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (1918, Tex. Civ. App.) 207 S. W. 367, 371 (corporation had power to buy cattle to be fed on hulls at time when there was no market for hulls). But a corporation manufacturing certain commodities may not enter into a building contract because the commodities will be used in building. *Wire Co. v. City of Baltimore* (1896, C. C. A. 4th) 74 Fed. 363. The manufacture of all kinds of electrical appliances is not an incidental power to manufacturing, storing, and distributing electricity for light, heat, and power. *Burke v. Mead* (1902) 159 Ind. 252, 64 N. E. 880. A farming corporation may not advance money to a railroad because by the building of the road their land will increase in value. *Richardson v. Bermuda Land and Live Stock Co.* (1919, Tex. Civ. App.) 210 S. W. 746. From these examples it appears that the implied power is allowed only when of a secondary nature to the principal power of the corporation, and dependent upon it.

[21] The favored-nation clause in a treaty gives to the respective citizens of the contracting parties in the territory of the other, as regards the subject matter covered by the treaty, all the gratuitous privileges extended to the most favored nation by the contracting parties. See, Washburn, *American Interpretation of the Most Favored Nation Doctrine* (1913) 1 VA. L. REV. 257; Herod, *Most Favored Nation Treatment* (1901). For example, the favored-nation clause in the Treaty with Italy embraced a subsequent provision in the Treaty with Argentine. *Matter of Scutella* (1911) 145 App. Div. 156, 129 N. Y. Supp. 20. Also compare the instant case with *In re Ah Chong* (1880, C. C. D. Calif.) 2 Fed. 733. (Chinese under favored-nation clause entitled to same fishing privileges as other aliens.) Cf. also, *Herrick v. Harmes* (1921, Calif. App.) 196 Pac. 807; *Vietti v. George K. Mackie Fuel Co.* (1921, Kan.) 197 Pac. 881.

Does the Fourteenth Amendment forbid such legislation?[22] For citizens it created no new privileges of substance.[23] In certain cases it placed aliens on an equal footing with citizens,[24] but under the police power the states may discriminate against aliens when adequate justification is shown.[25] So states may forbid them from acquiring land.[26] Is then the instant classification of aliens into those who have in good faith declared their intention to become citizens and those who have not, justifiable?[27] The declaration raises the presumption that the declarant will become a citizen. It follows that it is a reasonable exercise of the police power if its use but maintains the historic control of land,[28] keeping it in the hands of citizens or those who have declared their intention to become citizens. In the instant case the law applies equally to all who have not made the required declaration. Statutes applying only to those ineligible to citizenship, a greater discrimination, will in all probability be supported on the same ground, especially as

[22] For a view that it is unconstitutional, see Collins, *California Alien Land Laws* (1913) 23 YALE LAW JOURNAL, 330.

[23] *Slaughter House Cases* (1873, U. S.) 16 Wall. 36. *Civil Rights Cases* (1883) 109 U. S. 3, 3 Sup. Ct. 18.

[24] An alien cannot be taxed more than a citizen. *Ex parte Kotta* (1921, Calif.) 200 Pac. 957 (poll tax). Nor can he be deprived of the privilege of working. *Traux v. Raich* (1915) 239 U. S. 33, 36 Sup. Ct. 7; *People v. Warren* (1895, Super. Ct.) 13 Misc. 615, 34 N. Y. Supp. 942; *Ex parte Case* (1911) 20 Idaho, 128 116 Pac. 1037; cf. *Ex parte Kuback* (1890) 85 Calif. 274, 24 Pac. 737; *In re Tiburcio Parrott* (1880, C. C. D. Calif.) 1 Fed. 481. Nor of being a barber. *Templar v. Board of Examinations* (1902) 131 Mich. 254, 90 N. W. 1058. Nor of obtaining a pedlar's license. *State v. Montgomery* (1900) 94 Me. 192, 47 Atl. 165.

[25] A state may preserve its labor for its own citizens and forbid the employment of aliens on state contracts. *Heim v. McCall* (1915) 239 U. S. 175, 36 Sup. Ct. 78. For an able criticism of this case see Powell, *Right to Work for the State* (1916) 16 COL. L. REV. 99. It has been held justifiable to restrict licenses to sell liquor to citizens of the United States. *Trageser v. Gray* (1890) 73 Md. 250, 20 Atl. 905. A pilot must be a qualified voter. *State v. Ames* (1907) 47 Wash. 328, 92 Pac. 137. Reserving a pedlar's license to citizens has been supported. *Commonwealth v. Hana* (1907) 195 Mass. 262, 81 N. E. 149. Cf. *State v. Montgomery, supra,* note 24. A state may preserve its game for its own citizens even against resident aliens. *Patsone v. Commonwealth of Pennsylvania* (1914) 232 U. S. 138, 34 Sup. Ct. 281.

[26] See *supra* note 12.

[27] That this type of legislation is reasonable was admitted by Viscount Chinda, as shown by the following extract from the Aide-Memoire in support of his note of June 4, 1913:

"In a number of states, the right of aliens to hold real estate has been made to depend upon actual filing of declarations of intention to become citizens. That requirement, as a condition precedent to the exercise of the right in question, cannot be said to be unreasonable or illogical. A relation is thereby established between said rights and eventual citizenship, because the continued existence of the right depends upon actual completion of the process of naturalization." *Aide Memoire,* Japanese Embassy July 3, 1913, *Controversy—United States and Japan-California Question, op. cit.* Annex no. 6, at p. 14.

[28] See *supra* note 10.

the class is created by the Federal Government. The practical effect of both classes of statutes is to bar the ineligible alien, for one who cannot become a citizen is unable to make a *bona fide* declaration of intention to become one.

It is unfortunate that only a few nations are affected by this legislation. The increasing number of these laws, and the feeling which they represent, make it doubtful whether the Federal Government would conclude a treaty contrary to them. The remedy lies in a clearer diplomatic understanding between the parties interested.[29]

PROPERTY IN INTOXICANTS

Judging by contemporary periodicals, liquor could not be a more fruitful source of discord if the apples of Paris themselves had been pressed into service to make our supply. The question of "property rights" in liquor, as it arises under the prohibition statutes, state and national, is well settled however, in one aspect, and strangely enough, in favor of the unlawful holder. Such a holder may take what dry comfort he can from the fact that if someone steals the liquor from him, that taker is a thief, and will be punished as such.[1]

At first glance, this conclusion does not seem at all startling. It is accepted that the wrongful taker of property should be punished for larceny. But here, plainly enough, is our question. Is liquor property?

There are three types of cases in which this question arises. One is where the state, which has confiscated the liquor, is one party and the holder of the liquor is the other. A second is where the holder himself sues some third person in a civil action of contract or tort, involving the liquor. The third case is where the state is again a party, but in a criminal action against some third person who has taken the liquor from the holder. In the first class of cases, long before the Volstead Act's[2] last word on the subject, courts had held that it is well within the police power to deprive the owner of rights of property in things deemed noxious to public health and morals by state seizure and confiscation.[3]

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[29] For a presentation of the economic problem in California, see the report of the California State Board of Control, *California and the Oriental* (1920).

[1] *Arner v. State* (1921, Okla.) 197 Pac. 710.

[2] Act of Oct. 28, 1919 (41 Stat. at L. 305).

[3] See *Mugler v. United States* (1887) 123 U. S. 623, 665, 8 Sup. Ct. 273, 299 (liquor); *Mullen v. Mosely* (1907) 13 Iowa, 457, 90 Pac. 986, 12 L. R. A. (N. S.) 394, note (gambling implements)." . . . . the right to hold intoxicating liquors *for personal use* is not one of those fundamental privileges of a citizen of the United States." *Crane v. Campbell* (1917) 245 U. S. 304, 308, 38 Sup. Ct. 98, 99.

Courts and legislatures have said harsh things about liquor,—anything from the usual "No property rights of any kind whatsoever shall exist in said prohibited liquors" (Okla. Rev. Laws, 1910, sec. 3620), to "Along with outlaws and alien enemies, they have been debarred of all judicial standing from most ancient times." *Robertson v. Porter* (1907) 1 Ga. App. 223, 231, 57 S. E. 993, 996.

The question has always been whether this principle extended to the relationships of the owner with all persons other than those representing the state. This has resulted in a decided difference of opinion in the second group of cases. These are generally of two kinds: in contract, where the consignor or consignee as owner sues some third person (a carrier) for non-delivery of the liquor;[4] in tort, where one claiming to be the owner sues in conversion some third party who has attached the plaintiff's liquor as another's property, on a judgment against that other.[5] The courts that permit the plaintiff to recover by virtue of his property in the liquor justify their stand by saying that the statutory provisions referred to[6] were never meant to make the goods "free booty" for the rest of the world.[7] Other courts, in square conflict on the same facts and under similar statutes, have said that the plain intent of the legislatures was to "kill" the liquor traffic,[8] and the legislatures seem to have decided that one of the ways to do so is to destroy "property rights of any kind whatsoever in liquor."[9] The plain legislative intent should therefore be effectuated,[10] even if in order to do so it is necessary to cut off all claims arising from ownership against third persons as well as against the state. If one can find a majority tendency in such a chaos of conflicting decisions, it seems to be toward the latter view.[11]

Under such circumstances there does not seem to be much "property" left to the "owner" in his illegally held liquor. He has not enough to keep the state from taking it from him,[12] nor enough to get it back or

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[4] *Norfolk Ry. v. Dehart Co.* (1920) 127 Va. 415, 103 S. E. 594; *Miller v. Chicago Ry.* (1913) 153 Wis. 431, 141 N. W. 263, 45 L. R. A. (N. S.) 334, note (gambling machine).

Contracts for the *sale* of liquor, whether by mortgage or otherwise, generally give neither vendor nor vendee rights of action against each other by the express terms of most state prohibition laws. Conn. Rev. Sts. 1875, ch. 14, sec. 2. *Korman v. Henry* (1884) 32 Kan. 49, 3 Pac. 764. The same result was reached "even in the absence of a statute forbidding recovery, or destroying property rights in the goods sought." *Jackson v. City of Columbia* (1920, Mo.) 217 S. W. 869, 871.

[5] *Monty v. Arneson* (1868) 25 Iowa, 383.

[6] *Supra* note 3.

[7] *Barron v. Arnold* (1890) 16 R. I. 22. There is an intimation in these conversion actions that such an attachment by the defendant is a sort of larceny by legal process, and should not be permitted any more than is any other larceny. *Monty v. Arneson, supra* note 5, at p. 387.

[8] *Donohue v. Maloney* (1881) 49 Conn. 163; *Stajcar v. Dickinson* (1918) 185 Iowa, 49, 169 N. W. 756.

[9] *Supra* note 3; Ga. Extra Sess. Laws, 1915, part I, tit. 2, *Intoxicating Liquors,* sec. 20.

[10] *Donohue v. Maloney, supra* note 8.

[11] See strong dissent, *Monty v. Arneson, supra* note 5 at p. 389.

[12] Consistently enough, where the owner has no property rights against the state, the state does not exact from him the duties generally due it in respect to property. It is on this ground that we can explain the holding that the smuggler of contraband opium which has been confiscated, should not be com-

recover its value from anyone else who takes it from him under legal process or otherwise; but he has enough for the purposes of the state, so that the latter can punish such third person who takes without legal process for the technical crime of larceny.[13] This seems especially inconsistent when the early common law allowed no conviction for the larceny of any object in which there was no property,[14] as for example, dogs and monkeys, because of their baseness. And surely liquor, in the eyes of the law to-day, is sufficiently "base." The directness of the analogy, however, is somewhat lost when it is noted that the reason for holding that such taking was not a felony was based, not on careful distinctions of property and possession, but on the belief that "dogs, cats, bears, foxes, monkeys, ferrets and the like . . . . shall never be so highly regarded by the law, that for their sakes a man shall die."[15] Obviously, a pure question of policy. And so, fundamentally, public policy is the *ratio decidendi* in the leading case of *Commonwealth v. O'Rourke*,[16] which, some seventy years ago, laid down the universally accepted rule that wrongful taking from one who in the eyes of the law, himself has neither legal property nor possession, is still theft.[17]

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pelled to pay an additional penalty laid on "goods, wares, and chattels," which are not declared, since the "outlaw drug" could not be intended by the legislature to be included in the term "goods, wares, and chattels" of merchandise. *United States v. Sischo* (1919, W. D. Wash.) 262 Fed. 1001. See also *United States v. One Ford Automobile* (1919, N. D. N. Y.) 257 Fed. 894. The government may, of course, expressly reserve the power to tax property illegally held. *United States v. Boze Yuginovich* (1921) 41 Sup. Ct. 551.

[13] "No larceny can be committed unless there be some property in the thing taken." 4 Blackstone, *Commentaries*, **235, ". . . . a felonious taking must be of the possession." 3 Coke, *Institutes*, 110.

[14] 2 Blackstone, *op. cit.* *394; 4 *ibid.* *234, 3 Coke, *op. cit.* 109.

See also 4 Blackstone, *op. cit.* *235, "Larceny also could not at common law be committed of treasure trove or wreck till seized. . . . . for till such seizure no one hath a determinate *property* therein." 4 *ibid.* **235, ". . . . stealing the corpse itself, which has no *owner* (though a matter of grave indecency) is no felony . . . ."

[15] 3 Burns, *The Justice of the Peace* (22d ed. 1814) tit. *Larceny*, 245. See also 3 Coke, *op. cit.* 109, "and therefore no person shall *die* for them."

[16] (1852) 64 Mass. 397, 401 per Cushing, J.: "Of the alternative moral and social evils, which is the greater,—to deprive property unlawfully acquired of all protection as such, and thus to discourage unlawful acquisition, but encourage larceny; or to punish, and so discourage larceny, though at the possible risk of thus omitting . . . . to discourage unlawful acquisition? The balance of public policy, if we thus attempt to estimate the relative weight of alternative evils, requires, it seems to us, that the larceny should be punished. Each violation of the law is to be dealt with by itself. The felonious taking has its appropriate and specific punishment; so also has the unlawful acquisition."

[17] *Spalding v. Preston* (1848) 21 Vt. 1 (German silver to be milled into counterfeit dollars); *Bales v. State* (1868) 3 W. Va. 685 (poker chips); *Osborne v. State* (1906) 115 Tenn. 717, 92 S. W. 853 (pistol); *Smith v. Indiana* (1918) 187 Ind. 253, 118 N. E. 954, L. R. A. 1918 D, 690, note (punchboard); *Thomas v. State* (1917) 130 Okla. Cr. 414, 164 Pac. 995 (murder and robbery for liquor);

There can be little question that however clear the cases are on the policy of punishing such crimes, there is an unscientific vagueness in whatever analysis they may make of the legal concept of property. To say that "the law punishes the larceny of property . . . . because of its (property's) own inherent legal rights as property"[18] is altogether begging the question. Property, in the sense of physical objects, has no "rights,"—owners have a "*property*" in those objects which gives them rights against other people.[19] Where the law has condemned certain physical objects as practically "deodands"[20] in which those, previously owners, can now have no rights of property either against the state or others, to be compelled to consider the offence one against "the inherent legal rights" of the object itself, is an admission that the owner himself no longer has any legal property which the taker can invade. The holder has no rights which can be violated; it is ridiculous to say that the object has any,—the breach of duty can only be against the state. Either there is an infinitesimal amount of property left in the possessor of the object, so small that the state can see it, or else the state is in fact punishing merely a manifested criminal intent in cases where no property right was invaded.

It may be suggested that the National Prohibition Act[21] will afford a new basis for departure from the theory of conviction under state statutes. None of the state prohibition acts, under which these convictions have been upheld, has specifically made the possession itself a crime.[22] By general interpretation, it is only possession with intent to sell that is unlawful.[23] It might well be said, then, that it is the *intent* to violate the law that is being penalized, and not the possession itself. By section three of chapter two of the Volstead Act, however, the possession itself is outlawed and expressly made a crime.[24] It might, then, more logically be argued that here the thief could not possibly violate the holder's right of possession, and therefore could not be guilty of larceny. But by construction with section thirty-three of the same chapter, it is plain that it is the possession of liquor

State v. Donovan (1919) 108 Wash. 276, 183 Pac. 127 (liquor). See also 11 A. L. R. 1032, note.

[18] *Commonwealth v. O'Rourke, supra* note 16 at p. 399.

[19] Hohfeld, *Fundamental Legal Conceptions* (1913) 23 YALE LAW JOURNAL, 16, 22.

[20] Holmes, *The Common Law* (1881) 7, 24-26.

[21] *Supra* note 2.

[22] But see Okla. Sess. Laws, 1910-11, ch. 70, secs. 4, 5. And note the use of the term *possession* in the language of the court in *Arner v. State, supra* note 1.

[23] *Sommer v. Cate* (1867) 22 Iowa, 585; *Pine v. Commonwealth* (1917) 121 Va. 812, 93 S. E. 652; (1921) 19 MICH. L. REV. 660. See also *Edwards v. American Express Co.* (1903) 121 Iowa, 744, 96 N. W. 74 (possession of gambling machine must be with intent to *use* for gambling, to make it illegal); but *contra, Stanley Liquor Co. v. People* (1917) 63 Colo. 456, 168 Pac. 750 (mere possession illegal).

[24] "No person shall . . . . possess any intoxicating liquor except as authorized in this Act." See *supra* note 2.

unlawfully acquired that is made a crime.[25] Is it not just as reasonable, then, to say that here, too, it is the violation of the law that makes the possession illegal? In the case of the state liquor statutes, it is the future intent,—the contemplated violation of the law—that makes the possession illegal; in the case of the National Prohibition Act it is the past intent—the executed violation of the law. The reason and the remedy are the same in both cases. Shall the result be different because in the one case the legislative declaration is that "there shall be no property rights of any kind whatsoever in liquor" intended to be *sold* in violation of the law, and in the other it is that there shall be no legal possession of liquor *bought* in violation of the law?

Even if there is a real difference between the two prohibitions, it is significant to note that in 1809 it was agreed that such a distinction could make no difference in a conviction for larceny.[26] "For where game was taken larceniously from the person of a party unqualified, and who by sundry statutes was forbidden not only to kill game, but even to have it in his *possession,* the possession was nevertheless held sufficient for the purposes of an indictment for larceny."[27]

This, of course, just as plainly begs the question as do the previous cases. It seems to point out conclusively, however, that the underlying ground for conviction, in all cases of this type, is public policy. There seems no escape from the conclusion that no matter how the owner's rights of property and possession are diminished, there will always be "possession . . . . sufficient for the purposes of an indictment for larceny."[28] Does it make any difference, then, whether courts rely upon a vestigial remainder of property, or whether we insist that, admitting the non-existence of property rights, they declare that public policy requires the punishment of one who has so plain an intent to be a thief? The former is more usual, the latter, perhaps better analytically, but in either case the courts reach the desired result—the merited punishment of a dangerous member of society.

Since this comment went to press, the case of *People v. Spencer* (1921, Calif. App.) 201 Pac. 130, has held that intoxicating liquors could not be the subject of larceny, on the ground that the Volstead Act declared that "no property right shall exist in any such liquor." The court reversed the usual method of attack. It came to an eminently logical conclusion on the question of property rights—based on however unsatisfactory a premise[1]—but, rather unfortunately, does not discuss at all the policy of giving the defendant the benefit of the distinction. Does this decision, alone in its field, mark a new departure?

[25] ". . . . the burden of proof shall be upon the possessor . . . . to prove that such liquor was lawfully acquired . . . ." Volstead Act, ch. 2, *supra* note 2.

[26] *Jones' Case,* reported in 3 Burns, *op. cit.* tit. *Larceny,* 241.

[27] *Ibid.* A modern case also seems to look forward to this question in its discussion of larceny as a crime even against possession illegal in itself. *Ellis v. Commonwealth* (1920) 186 Ky. 494, 217 S. W. 368.

[28] *Jones' Case, supra* note 26.

[1] See *supra* p. 307, notes 14, 15.

REGULATING CHILD LABOR BY FEDERAL TAXATION

In 1916 Congress enacted the statute commonly known as the Child Labor Law[1] which forbade the transportation in interstate commerce of goods made in factories in which children under fourteen were employed or in which children between fourteen and sixteen were employed more than eight hours a day. Every state in the Union had adopted laws to regulate the employment of minors,[2] but such regulations showed great diversity among the states in respect to age and working conditions under which minors might legally be employed. Uniformity throughout the country could be obtained only by federal enactment, hence the congressional statute under the label of the elastic commerce clause.[3] But the Supreme Court held the statute unconstitutional, chiefly on the ground that its necessary effect was to regulate the hours of labor of children in business establishments within the states—a field belonging exclusively to the state.[4]

Within six months after the decision was announced Congress again attempted to attain the desired end of uniformity, this time resorting to the taxing power. In the Revenue Act of 1918 were included sections[5] which levy a tax of ten per cent on the net profits of employers who employ in factories children under fourteen or employ children between fourteen and sixteen more than eight hours a day. The only material difference between this Act and the former Child Labor Law

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[1] "An Act to prevent interstate commerce in the products of child labor and for other purposes." Act of September 1, 1916 (39 Stat. at L. 675) ch. 432.

[2] Statement of Mr. Justice Day in *Hammer v. Dagenhart* (1918) 247 U. S. 251, 275, 38 Sup. Ct. 529, 532.

[3] See Thurlow M. Gordon, *The Child Labor Law Case* (1918) 32 HARV. L. REV. 45, 63.

[4] *Hammer v. Dagenhart, supra* note 2, at p. 276, 38 Sup. Ct. at p. 533: "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend."

The opinion evoked extensive comment, some adverse, some favorable. T. R. Powell, *The Child Labor Law* (1918) 3 So. L. QUART. 175; Thurlow M. Gordon, *op. cit.* 32 HARV. L. REV. 45; NOTES (1918) 17 MICH. L. REV. 83; Andrew A. Bruce, *Interstate Commerce and Child Labor* (1918) 3 MINN. L. REV. 89; William C. Jones, *The Child Labor Decision* (1918) CALIF. L. REV. 395; Minor Bronaugh, *A Federal Regulation of Child Labor* (1918) 22 LAW NOTES, 86; Robert E. Cushman, *The National Police Power* (1919) 3 MINN. L. REV. 452; Frederick Green, *The Child Labor Law and the Constitution* (1919) 2 ILL. L. BUL. 126; Henry W. Biklé, *The Commerce Power and Hammer v. Dagenhart* (1919) 67 U. PA. L. REV. 21.

[5] "An Act to provide revenue and for other purposes." Act of February 24, 1919 (40 Stat. at L. 1057) ch. 18, secs. 1200-1207.

is that in the 1916 Act the penalty was exclusion of the employer's products from interstate commerce, while in the 1918 Act the penalty is a ten per cent tax upon the net income derived from his business. That the real purpose of the measure was not to raise revenue but to discourage the employment of children under conditions which do not conform to the prescribed standard is obvious; and such, of course, will be the effect of the Act. This was frankly admitted by all advocates of the bill during the Senate debates upon it.[6]

This brief outline of the historical setting of the Child Labor Tax Law is essential to a consideration of the legal problem involved therein, namely the constitutionality of the tax.

On its face the Law imposes an excise tax which Congress has undoubted power to levy. Its direct effect, however, will be to raise little or no revenue while its indirect effect will be to regulate the employment of children within the states—a matter within the police power of each state. Does the Act, therefore, deal with a matter reserved exclusively to the states by the Tenth Amendment? This is the problem; and were it not for the previous Child Labor decision the answer would seem on authority too clear to require comment.

In *McCray v. United States*[7] the Supreme Court sustained a federal excise tax of ten per cent on oleomargarine colored to resemble butter. It was conceded that the tax would have the indirect effect of preventing the manufacture of the article and that this was a subject within the field of direct control by the state. The taxpayer contended that Congress had exerted its acknowledged taxing power for an unlawful purpose, because the necessary operation and effect of the tax was to destroy the oleomargarine industry and thus to exert a power reserved to the several states; but the court rejected this argument,[8] and, as

[6] Cong. Rec. Dec. 18, 1918, p. 620: "Mr. Overman: Mr. President, the Senator from Massachusetts (Mr. Lodge) very frankly admits that the purpose of this provision is to nullify a decision of the Supreme Court of the United States. This bill is entitled 'A bill to raise revenue'; that is stated as its purpose. I want to ask my colleague if this provision was inserted for the purpose of raising revenue? Was it the desire of the committee to raise revenue when they incorporated this provision in the bill?"

"Mr. Simons: I can only make the statement to my colleague that there was no estimate presented to the committee as to the amount of revenue which would be derived from it; and I do not think anyone suggested that any would be derived."

[7] (1904) 195 U. S. 27, 24 Sup. Ct. 769.

[8] At p. 56, 24 Sup. Ct. at p. 776, Mr. Justice White said: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

In re Kollock (1897) 165 U. S. 526, 536, 17 Sup. Ct. 446, 447. Fuller, C. J., said: "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

Mr. Justice Holmes said in referring to the case in his dissenting opinion in the Child Labor decision, "In a very elaborate discussion the present Chief Justice [White] excluded any inquiry into the purpose of an act which, apart from that purpose, was within the power of Congress."[9] In the Child Labor case the majority gave lip service to the correctness of this principle[10] but in their actual decision they departed from it. They fixed their attention not on the direct result of the statute, which was to exclude from interstate commerce products of factories where children were employed—a subject within the field of Congressional power—but on the indirect result, which was to regulate the hours of labor of children, and they declared that therefore the law encroached upon the reserved power of the states.[11]

Reasoning from the premises that Congress cannot do indirectly that which it is forbidden to do directly and that the regulation of labor is inherently in the states, Judge Boyd of the District Court for North Carolina has held the Child Labor Tax Law invalid. *George v. Bailey* (1921, W. D. N. C.) 274 Fed. 639. His opinion stresses the former Child Labor case,[12] but makes no reference to the *McCray* case.[13]

The premise that Congress cannot do indirectly that which it is forbidden to do directly is not universally true.[14] As already indicated, the tax on colored oleomargarine was sustained[15] although its indirect effect was to prevent the manufacture of the article—a thing which

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[9] *Hammer v. Dagenhart, supra* note 2, at p. 278, 38 Sup. Ct. at p. 533.

[10] *Ibid.* at p. 276, 38 Sup. Ct. at p. 532: "We have neither authority nor disposition to question the motives of Congress in enacting this legislation." Cf. note 11.

[11] *Ibid.* at p. 271, 38 Sup. Ct. at p. 520: "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states." See also *supra* note 4.

[12] At p. 642: "Upon consideration of the prime question in this case and the authorities bearing upon it, the conclusion seems irresistible that the national Legislature cannot do indirectly that which it is forbidden by the Constitution to do directly; and it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the states, then Congress cannot intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method."

[13] *Supra,* note 7.

[14] Mr. Justice Holmes in his dissenting opinion in *Hammer v. Dagenhart, supra* note 2, at p. 277, 38 Sup. Ct. at. p. 533, says: "The objection urged against the power is that the states have exclusive control over their methods of production and that Congress canot meddle with them; and taking the proposition in the sense of direct intermeddling I agree to it and suppose no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects it may have, however obvious it may be that it will have those effects; and that we are not at liberty upon such grounds to hold it void."

[15] *McCray v. United States, supra* note 7; *Weber v. Freed* (1915) 239 U. S. 325, 36 Sup. Ct. 131.

Congress could not do directly. Indirectly Congress may limit the manufacture and sale of impure foods,[16] intoxicants,[17] lottery tickets,[18] or other articles,[19] by closing the channels of interstate commerce to such articles, although in respect to no one of them could Congress by direct legislation have effected regulation. The Child Labor case did not purport to overrule these cases, but to distinguish them. It is not safe, therefore, to conclude that Congress cannot by taxation accomplish indirectly a result which is admittedly beyond Congressional power to accomplish by direct legislation.[20]

The principle which excludes judicial inquiry into the purpose of an act which on its face is within a constitutional power of Congress gives to the legislative branch of the Government a broad and dangerous power.[21] Improper use of such power may be used seriously to curtail the power of the states over local affairs.[22] But history shows that it has seldom been so used. And the sound remedy, as the Supreme Court has said, is an appeal to the electorate rather than to the judiciary.[23] Beyond certain limits, indeed, arising from the principles of the Constitution itself, Congress cannot go. Taxing an instrumentality of a

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[16] *Hipolite Egg Co. v. United States* (1911) 220 U. S. 45, 31 Sup. Ct. 364.

[17] *Clark Distilling Co. v. Western Md. Ry.* (1917) 242 U. S. 311, 37 Sup. Ct. 180.

[18] *Champion v. Ames* (1903) 188 U. S. 321, 23 Sup. Ct. 321.

[19] See cases collected in Gordon, *op. cit.* 32 HARV. L. REV. 45, 56-67.

[20] It is suggested that the present tax law is valid in (1919) 22 LAW NOTES, 205, and NOTES (1918) 17 MICH. L. REV. 83, 87.

[21] In the *McCray* case, *supra* note 7, at p. 55, 24 Sup. Ct. at p. 776, Mr. Justice White said: "It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of government, where a wrong motive or purpose has impelled to the exertion of the power, abuses of power conferred may be temporarily effectual. The remedy for this, however, lies not in the abuse by judicial authority of its functions, but in the people upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

[22] See Cong. Rec. (Dec. 18, 1918) p. 619: "Mr. Hardwick: . . . . If the Senator feels that the police power of any one or more states was not exercised in a way to conform to the Senator's judgment, if it were possible to do so, the Senator would not hesitate to constitute Congress as a final judge of the matter whether they had been properly exercising it or not, and would use the taxing power to carry out his own ideas?

"Mr. Lodge: It is not a question of my own ideas.

"Mr. Hardwick: I am asking the question in all sincerity. Would not that sort of doctrine utterly destroy the right of the local community to regulate its domestic concerns?

"Mr. Lodge: I say we ought to do it as little as possible.

"Mr. Hardwick: It is a very dangerous doctrine.

"Mr. Lodge: I admit it is a dangerous power to use, but I think cases have arisen where it is less dangerous to use the power than to neglect the evil. I think there is very much better and stronger ground for this legislation than there was for the oleomargarine legislation. . . . ."

[23] *Supra* note 18; see also *Gibbons v. Ogden* (1824, U. S.) 9 Wheat. 1, 197.

state government will be held unconstitutional.[24] Conceivably the Supreme Court may decide that Congress has gone too far in the Child Labor Tax Law because the indirect result is to regulate a local matter. But to reach this decision they must overrule the *McCray* case and distinguish the case of *Veazie Bank v. Fenno*.[25] It does not seem likely that they will do so. While there may be no sound reason for differentiating between the commerce power and the taxing power in determining whether to go behind the face of the statute, it is not believed that *Hammer v. Dagenhart*[26] represents so complete a change in the court's attitude on the subject of judicial inquiry into legislative motive, evidenced by the effect of the statute, as must be effected before the Child Labor Tax Law can be held unconstitutional. Opinions may differ as to the wisdom of using taxation to accomplish an end, however commendable, other than the raising of revenue, but in seeking to escape one evil we should not fly to another. In the doctrine that the court may intrude its judgment upon questions of policy or morals whenever a statute comes before it, would be an equal danger, that of judicial autocracy.

T. W. S.

WHEN A BAILMENT BECOMES A PLEDGE

One of the most difficult combinations of facts which any court has recently been called upon to analyse was presented to the British Court of Appeal in the interesting case of *Blundell-Leigh v. Attenborough* [1921] 3 K. B. 235. On the first of November the plaintiff delivered to one Miller certain jewelry, under an agreement whereby the latter was to examine it and determine how much money he would offer to lend the former on it as security. Miller, on the third of November, pledged the jewelry for one thousand pounds to the defendant, who acted in good faith. Pursuant to an agreement made on November the fifth, Miller, on that date, loaned five hundred pounds to the plaintiff, who gave him her promissory note for six hundred pounds, payable in six equal monthly instalments, the whole amount to become due upon default in the payment of any instalment. Miller was to retain the jewelry, and the plaintiff gave him written authority to realize in case she defaulted. Miller subsequently borrowed three hundred pounds from one Berners and deposited with him the plaintiff's promissory note and the defendant's counterfoil deposit note. Miller committed

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[24] *The Collector v. Day* (1871, U. S.) 11 Wall. 113.

[25] (1869, U. S.) 8 Wall. 533, sustaining a tax on the notes of state banks, the obvious purpose and actual effect of which was to drive their circulation out of existence. There was, however, ground independent of taxation on which might be rested the power of Congress, namely its power to maintain the national currency.

[26] *Supra* note 2.

suicide on December the sixteenth. The plaintiff, having been notified by Berners that he was holding her note, paid him four hundred pounds. Without making a further tender to anyone, she sued the present defendant to recover possession of her jewels. The Court held[1] that the delivery of the jewelry to Miller on November the first was a delivery for the purpose of creating a pledge, which was completed on November the fifth; that the character of the delivery to Miller was not altered by the fact that the jewelry had in the meantime been prematurely pledged to the defendant; and that, as the plaintiff had made no tender, she could not recover possession of her jewelry.

It is believed that this case can be satisfactorily analysed only by considering it in its successive stages. In the first place, what was the situation when the plaintiff entered into the agreement with Miller on November the fifth? The delivery of the jewelry to Miller on the first seems to have been nothing more than a bailment,[2] although the Court apparently considered it as a sort of "inchoate pledge," since it spoke of "the pledge" having been completed on November the fifth.[3] The parties did not intend that Miller should hold the property as security until he became a creditor of the plaintiff, and it is of the essence of a contract of pledge that the *res* should be delivered as security for some debt or engagement.[4] Property may be pledged to secure a future debt,[5] but when the plaintiff delivered her jewels to Miller, there was no assurance that there would ever be a debt.[6] A mere agreement to create a pledge in the future is not a pledge.[7] There

[1] Reversing the decision of Salter, J., [1921] 1 K. B. 382.

[2] Story defines a bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust," and a pledge as "a bailment of personal property, as a security for some debt or engagement." Story, *Bailments* (8th ed. 1870) secs. 2, 286.

[3] It is difficult to reconcile the conclusion reached by the Court on this point with certain statements in its opinion. Lord Justice Bankes said: "It is obvious to my mind that the lady intended when she handed over this jewellery to Miller to create a valid pledge as between him and her from the moment when he handed her money by way of loan which she was prepared to accept." It is believed that this is a correct analysis of the situation. The learned judge seems to have been of the opinion that the pledge was created when the debtor-creditor relation was established. As a delivery, actual or constructive, is necessary to the creation of a pledge, it is believed that there never was a pledge from the plaintiff to Miller unless some such theory as that outlined in the second paragraph of this comment be accepted. See (1921) 37 L. QUART. REV. 398.

[4] Story, *op. cit.* sec. 300.

[5] *Moors v. Washburn* (1888) 147 Mass. 344, 17 N. E. 884; *Clymer v. Patterson* (1893) 52 N. J. Eq. 188, 27 Atl. 645.

[6] The jewelry was delivered to Miller in order that he might have an opportunity to examine it with a view to making an offer to lend money to the plaintiff on it as security. The parties did not intend Miller to hold the jewels as pledgee until he had made such an offer and the plaintiff had accepted it.

[7] *Howes v. Ball* (1827, K. B.) 7 Barn. & Cress. 481.

must be an actual or constructive delivery of possession.[8] Of course, if the *res* is already in the possession of the pledgee,[9] or his agent,[10] the pledge comes into existence when the contract is completed. But Miller had parted with the property while he was only a bailee; and when the contract of pledge was made between the plaintiff and himself, the defendant, who could in no sense be considered as Miller's agent, was in possession in his own right. A superficial glance at the facts seems inevitably to lead to the conclusion that the defendant held the goods wrongfully even after the ostensible pledge to Miller on November the fifth. Supposing, however, that the defendant had re-delivered the jewelry to Miller immediately after November the fifth, and the latter, being then in possession as pledgee, had re-pledged to the defendant, the latter apparently would then have held rightfully as sub-pledgee,[11] although, as a result of the original transaction, both he and Miller would have been liable to the plaintiff for a technical conversion.[12] Granting that the possession of the defendant might thus have been made rightful, may we not go a step further and say that, inasmuch as it is the modern tendency of the law to dispense with mere formalities, the omission of this formal procedure did not fundamentally alter the situation? There seems to be no sound reason for requiring the defendant temporarily to part with the property merely for the purpose of affording Miller an opportunity immediately to re-deliver it to him. Hence the defendant, although still liable for the technical conversion, was now rightfully in possession of the pledged articles.

Having thus arrived at the conclusion that the defendant became a rightful sub-pledgee as a result of the November-the-fifth transaction

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[8] 22 Halsbury, *Laws of England* (1912) tit. *Pawns and Pledges,* 238; 31 Cyc. 799, and cases cited.

[9] Story, *op. cit.* sec. 297.

[10] *City Bank of New Haven v. Perkins* (1864) 29 N. Y. 554.

[11] The authorities are not entirely satisfactory on the question of whether property may be re-pledged for a greater sum than that for which the original security was given. Statements may be found in the books to the effect that it is a conversion thus to re-pledge property. See *Douglas v. Carpenter* (1897) 17 App. Div. 329, 332, 45 N. Y. Supp. 219, 221; (1897) 11 HARV. L. REV. 201. But it is generally held that merely to re-pledge goods for a sum larger than the original debt is not a conversion. *Donald v. Suckling* (1866) L. R. 1 Q. B. 585. It is usually said that a pledgee can assign no greater right than he himself has. Jones, *Collateral Securities and Pledges* (3d ed. 1912) sec. 423. This is true, of course, but he may assign whatever interest he has, and a tender to the sub-pledgee of the amount due from the first pledger to the first pledgee extinguishes the title of the sub-pledgee. *Donald v. Suckling, supra; Talty v. Freedman's Savings & Trust Co.* (1876) 93 U. S. 321. Hence there was no actual conversion until the sub-pledgee refused to recognize the property of the first pledgor.

[12] The plaintiff did not, by entering into the contract of pledge on November the fifth, waive her cause of action for the conversion which occurred on November the third, because when she made the agreement with Miller she had no knowledge that a cause of action existed.

between the plaintiff and Miller, we may now proceed to an analysis of the various situations which arose between that transaction and the bringing of suit by the plaintiff. What was the effect of the sub-pledge to the defendant without a transfer of the debt which the property was originally pledged to secure? Prior to the delivery of the plaintiff's note to Berners, it seems that the defendant was privileged to retain the jewelry until the plaintiff made a tender to Miller of the amount due on her note.[13] The only effect of the subsequent assignment of the debt to Berners, therefore, was to place him in Miller's position with respect to the plaintiff, so that her right to the present possession of the jewelry became conditional upon a tender by her to Berners of the amount remaining unpaid on her note.[14] The language of the court concerning the necessity of a tender by the plaintiff is not exactly clear. The decision declares that a tender was necessary, but fails to indicate definitely to whom it should have been made. The language of Lord Justice Bankes, however seems to justify the inference that the Court would have required a tender to the defendant.[15] If the inference be correct, it would seem that the conclusion of the Court is open to question. That the pledgee of goods, other than negotiable securities, may not, by a sub-pledge thereof, prejudice the rights of his pledgor, is a principle which may be stated without qualification.[16] As was indicated before,[17] the transfer of the promissory note to Berners did not extin-

[13] This would be true whether the English rule, which has been followed by some American courts, or the majority American rule should be applied, since there was no conversion by the defendant after November the fifth. See note 9, *supra*. According to the former rule, a pledgor whose goods have been wrongfully disposed of by his pledgee is not entitled to recover possession of them without tendering the amount of his debt to the person to whom it is due. *Donald v. Suckling, supra* note 11; *Talty v. Freedman's Savings & Trust Co., supra* note 11. Where the latter rule is followed, however, the pledgor may recover under such circumstances without making a tender, the pledgee being entitled to set off the amount due him. *Sproul v. Sloan* (1913) 241 Pa. 284, 88 Atl. 501.

[14] The only effect of the delivery of the counterfoil deposit note to Berners was to create in him as against the defendant the same right with respect to the jewels that Miller formerly had as pledgor of the defendant. By the delivery of the plaintiff's note to Berners, however, Miller vested in him whatever right Miller had against the plaintiff. This transaction did not, of course, prejudice the right of the plaintiff in her jewels. It merely had the effect of changing the person to whom she should tender the amount of her debt in order to have a right to the immediate possession of her jewelry.

[15] Lord Justice Bankes said: ". . . . I think that, there having been no tender, the defendant is entitled to judgment." Counsel for the defendant had said: "No tender having been made by the plaintiff to the defendant, who took the jewellery in pledge from Miller in good faith, the plaintiff is not entitled to recover." The writer of the headnote seems to have inferred from the language of the Court that a tender to the defendant was held to be necessary. The words of the headnote are: "The plaintiff having made no tender to the defendant was not entitled to recover the jewellery."

[16] Jones, *op. cit.* sec. 423.

[17] See note 14, *supra*.

guish the plaintiff's duty to discharge her debt, but she then owed it to Berners instead of Miller, and by tendering two hundred pounds to the former she would obtain a right to the immediate possession of her jewels. Since it is now settled law in England, however, that a pledgor whose goods have been wrongfully disposed of by his pledgee may not recover them or their value without tendering the amount of the debt which they were originally pledged to secure,[18] the Court was correct in holding that the plaintiff was not entitled to the present possession of her jewels; but it is to be regretted that it did not avail itself of the opportunity clearly to analyse a situation in the law of bailments and pledges which presents new and real difficulties.

A PROFESSOR'S SALARY AS INCOME FROM PROPERTY

Raymer v. Trefry (1921, Mass.) 132 N. E. 190, seems to be a case where there is too little analysis on the part of the law makers and too much on the part of the court. The question at issue was whether the salary of a Harvard professor was "income derived from property" within the language of the Massachusetts Income Tax Amendment of 1915.[1] That Amendment empowered the legislature to impose an income tax, with different rates upon "income derived from different classes of property," and with a lower rate upon "income not derived from property" than upon "income derived from property." A uniform rate, however, was required upon "income from the same class of property." The plaintiff claimed that a tax statute was unconstitutional because it taxed his salary, which he regarded as income not derived from property, at a higher rate than income derived from property, and specifically at a higher rate than income from annuities; such taxation, he contended, was not permissible under the grant of power contained in the Amendment.[2] The Court held, however, that the Statute was constitutional, since the plaintiff's salary was "income derived from property."

The purpose of the provisions of the Amendment as to different rates of taxation seems obvious. In England there has been since 1907 a difference in rates of taxation in favor of "earned" as against "unearned," or as termed by Gladstone, "lazy" incomes, that is in favor of incomes obtained by personal services as distinguished from

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[18] See note 13, *supra*.

[1] Mass. Const. Amendment 44, ratified November, 1915.

[2] By Mass. Gen. Acts, 1916, ch. 269, sec. 5 (a) income from annuities was taxed at 1½ per cent per annum, while by sec. 5 (b) income from professions, employments, trade, or business was taxed at the same rate. The objection is directed to Mass. Gen. Acts, 1919, ch. 324, sec. 1, which levied an additional tax of 1 per cent on all income received during 1918 and 1919 and taxable under sec. 5 (b) of the act of 1916. In *Tax Commissioner v. Putnam* (1917) 227 Mass. 522, 525, 116 N. E. 904, 907, the court refers to the various unsuccessful attempts to tax incomes made before the general grant of power given by the Amendment.

incomes accruing from investments.[3] There has been considerable agitation in this country for such differentiation under our income tax laws, particularly the federal law.[4] This Amendment seems beyond question to have been designed to permit the legislature thus to discriminate in favor of "earned" incomes, while in general required to keep its rates uniform. The fact that the experience of the draftsmen of the various English statutes was not made use of, but instead there was employed such a hopelessly indefinite term as "property," is but another example of the fondness of lawgivers and lawyers for familiar generalizations the very inclusiveness of which render them meaningless.

But since this word was used in the Amendment it was the duty of the court to attempt its interpretation as it was intended, not as it should be interpreted in any *saturnia regna* where words are used with precision. The Court says, however: "Property is a word of large import. It has been interpreted as including the right to make contracts for labor and for personal service." And it goes for its authority to the mooted federal cases dealing with the struggle between capital and labor. As an abstract proposition one does not see much to criticise in the court's view of property. It is a word of large import and it seems naturally to be used of any legal relation having value to the individual.[6] But the result of the case, so far as carrying out any conceivable intent that the framers of the Amendment could have said, seems so wrong as to be well nigh absurd. Salary earned by personal endeavors may thus be taxed at a higher rate than income from annuities. "Lazy" incomes may be favored over "industrious" incomes.[7]

[3] Finance Act (1907) 7 Edw. VII, c. 13, sec. 19, extended by Finance Act (1910) 10 Edw. VII, c. 8, sec. 67. Under the present law, Finance Act (1920) 10 & 11 Geo. V, c. 18, sec. 16 (continued by Finance Act (1921) 11 & 12 Geo. V, c. 32, sec. 24) there is allowed a deduction of a sum equal to one-tenth of the amount of "earned income," but not exceeding two hundred pounds. Under the English income tax system various kinds of income are classified in different "schedules"; and earned income, with a few comparatively unimportant additions, is limited to income within certain only of these schedules, and is then further limited to income "immediately derived by the individual from the carrying on or exercise by him of his trade, profession or vocation." Finance Act (1920) 10 & 11 Geo. V, c. 18, sec. 33; Income Tax Act (1918) 8 & 9 Geo. V, c. 40, sec. 14. See *Inland Revenue v. Shiel's Trustees* [1915] S. C. 159; *McDougall v. Inland Revenue* [1919] S. C. 86; Comstock, *British Income Tax Reform* (1920) 10 AM. ECON. REV. 488, 495.

[4] This has been advocated by the Treasury Department. See Montgomery, *Income Tax Procedure* (1921) 18; *ibid.* (1918) 27-30.

[5] *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277; *Coppage v. Kansas* (1915) 236 U. S. 1, 35 Sup. Ct. 240; *Bogni v. Perotti* (1916) 224 Mass. 152, 154, 112 N. E. 853; 855 ("the right to work is property"). Dean Pound, in his famous article, *Liberty of Contract* (1909) 18 YALE LAW JOURNAL, 454, has traced the manner in which a particular economic theory of competition was written into the Federal Constitution through use of the dogma of freedom of contract.

[6] See COMMENTS (1919) 29 YALE LAW JOURNAL, 91, 94, note 16.

[7] By the classification of incomes made in the Massachusetts statute (Mass.

The court says that there are other classes of income which may be thought to be "not derived from property" and these words may be given effect when the legislature shall make such classification for purposes of taxation. It is difficult to conceive of such other classes. The "right to contract" would seem to cover all cases except income from investments, which surely is income derived from property. Gifts may be thought to be what the court had in mind. Yet the gifts themselves are usually considered capital not income,[8] and the income from gifts is surely income from property.

It is absolutely necessary to make careful analysis of terms used. But unless one is choosing his own terms, such analysis cannot be made *in vacuo;* it must be made with an eye upon the degree of precision which the chooser of the terms used.[9] By a precise and fairly accurate conception of property as an abstract term, the court has reached an absurd result which nullifies an important and desirable part of this Tax Amendment. C. E. C.

WHAT IS A STRIKE?

By statute in New South Wales,[1] strikes were made illegal and any individual or registered union that aided in or instigated a strike was subjected to a penalty. The recent case of *Horley v. Federated Furnishing Trades Society* [1921] A. R. 10,[2] involved the interesting question as to whether certain facts constituted a strike. An employer had in his service three polishers, all belonging to the same union. One of them persistently completed his work in less time than was considered by his co-workers to be proper. The union, finding itself powerless to

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Gen. Acts, 1916, ch. 269) the legislature has actually made a considerable differentiation, operating generally in favor of earned incomes. But the Amendment seems not merely permissive, but also prohibitive, so far as discrimination *against* earned incomes is concerned.

[8] Maguire, *Capitalization of Periodical Payments by Gift* (1920) 34 HARV. L. REV. 20, 21, citing the rules of the Massachusetts Commissioner of Corporations and Taxation; Federal Revenue Act, 1918, sec. 213 (b) (3) and 233 (40 Stat. at L. 1057, 1065, 1077); cf. Clark, *Eisner v. Macomber and Some Income Tax Problems* (1920) 29 YALE LAW JOURNAL, 735, 740.

[9] This rule of construction seems elsewhere to have been appreciated by the court. *Tax Commissioner v. Putnam, supra* note 2; *Attorney-General v. Methuen* (1921) 236 Mass. 564, 573, 129 N. E. 662, 664. Cf. Mr. Justice Holmes dissenting in *Eisner v. Macomber* (1919) 252 U. S. 189, 219, 40 Sup. Ct. 188, 197: "I think that the word 'incomes' in the Sixteenth Amendment should be read in a sense most obvious to the common understanding at the time of its adoption. For it was for public adoption that it was proposed." In *Evans v. Gore* (1919) 253 U. S. 245, 40 Sup. Ct. 550, the court attempted to ascertain the intention of the framers of the Sixteenth (federal) Amendment, and in so doing seems to have removed the words "from whatever source derived" from the Amendment. See COMMENTS (1920) 30 YALE LAW JOURNAL, 75.

[1] The Industrial Arbitration Act, New South Wales Sts. 1912, Act no. 17, secs. 45, 47.

[2] Industrial Arbitration Reports, New South Wales.

make him work more slowly, induced the other two employees to leave and dissuaded the rest of its members from accepting work with the employer, for the purpose of forcing the latter to dismiss his over-efficient employee. The Court held that these facts constituted a strike.

The amount of labor litigation before our courts, coupled with the rise of the Kansas Court of Industrial Relations, renders the accurate definition of "a strike" of more than academic interest. The older view seemed to restrict the definition to cases involving wages.[3] But changing circumstances have added new criteria and the older cases well illustrate the difficulty of finding a comprehensive definition. A true definition should include a refusal to work in consequence of some alleged grievance which need not necessarily concern wages.[4] It is not a strike when only one man quits work. An essential element of a strike is the cessation of work by a number of men.[5] A strike is a stoppage rather than an abandonment of work. There must be an intention to return.[6] A strike is generally directed against the employer of the strikers; so generally, in fact, that this feature has been made part of the definition by many writers.[7] But this is not essential. There is the sympathetic strike, for example, which though not directed against the workers' own employers, is nevertheless a strike. Then again, there have been strikes for a political as distinct from an industrial purpose.[8] No breach of contract is necessary to constitute a strike, although it is frequently attendant.[9] Strikes are usually the result of pre-arranged agreements which at early common law were indictable as conspiracies.[10] But it is quite possible that a common understanding, resulting in a strike, may exist without previous conference or agreement. The cessation of work need not necessarily be simultaneous. If the movement is gradual, the cessation may nevertheless be a strike provided it takes place as the result of a common understanding.[11] The essential elements of a strike are seemingly (1) action by a number of individuals in quitting their work; (2) an intention to return; and (3) a common understanding with reference

[3] *Stephens v. Harris* (1887) 56 L. J. Q. B. 516.

[4] *Williams Bros. v. W. H. Berghuys Kolenhandel* (1915) 86 L. J. K. B. 334; see *Delaware, etc. Ry. v. Bowns* (1874) 58 N. Y. 573, 582.

[5] 24 Cyc. 833, note 64.

[6] *Uden v. Schaefer* (1920) 110 Wash. 391, 188 Pac. 395.

[7] Webster, *International Dictionary* (1919) 2058; "(14) Act of quitting work; specif., such an act done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer; . . . . ."; *Standard Dictionary* (1898) 1780; Bouvier, *Law Dictionary* (8th ed. 1914) 3159.

[8] *In re Iron and Shipbuilding, No. 11 Award* [1916] A. R. (N. So. Wa.) 423. A cessation of work as a protest against conscription was held to constitute a strike.

[9] *Encyclopaedia Britannica* (11th ed. 1911) 1024.

[10] *Rex v. Journeymen-Taylors of Cambridge* (1721, K. B.) 8 Mod. 10; *People v. Fisher* (1835, N. Y.) 14 Wend. 2; Cogley, *Strikes and Lockouts* (1894) 7, 103.

[11] *In re Federated Moulders' Union* [1916] A. R. (N. So. Wa.) 413.

to the grievance. A strike is apparently the cessation of work, intended as temporary, by a number of individuals acting in common understanding for the redress of certain grievances.

Apparently the perils of matrimony have been increased in Connecticut. The legislature has recently provided that any person owning an interest in real estate, "whose name has been changed" must within sixty days after "such change" file a certificate in the land records showing the name before and after change or be subject to a penalty.[1] But perhaps this does not apply to changes of cognomens incident to marriage, for the legislature with its well-known regard for the legal profession and the lawyer's need of new channels of business has left us in the dark as to just what was meant. If the Statute does not apply to married women, an increasingly numerous class of realty owners, obviously the title-searchers for whose benefit the legislation is plainly designed, have secured little by it. But, narrowly construed, the Statute is not broad enough to cover the mere assumption of a new name, and it may apply, therefore, only to a definite change of name by external authority, such as that made by court order. If this is the proper meaning, is a bride's name "changed" by her marriage or does she merely change it herself? A pleader for the Lucy Stone League, a league designed to assist those women "who dislike the total immersion in marriage which the loss of one's name implies" by persuading them to throw off the shackles implied in assuming the title of "Mrs.," argues in effect that it is only out-worn custom after all which effects the change.[2] But whether the lady herself is the moving force in the change or not, the legislature probably thought only of results, not causes, and hence the Statute should be construed as applying to *femmes coverts* owning real estate.[3] The Statute may then operate to assist the League in its propaganda for the retention of maiden names after marriage and give it a real reason for existence, at least in this State, for it can point out to affluent lady property-owners, who do not wish to be totally immersed in matrimony, a course between the humiliation of filing the required certificate and the suffering consequent upon forfeiting $10 to the town where the realty is situated, "to be recovered in a civil action in the name of the town."

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[1] Conn. Pub. Acts, 1921, ch. 42.

[2] *Mrs.* Francis Hackett (Signe Toksvig), *Have Women Names* (1921) 27 THE NEW REPUBLIC, 242.

[3] We are informed by one of the original draftsmen of the bill that it was his intention, and that of the committee to whom it was referred, that it should apply to married women, that it originally provided for a change "by marriage or otherwise," and that the clerk of bills in pursuance of his statutory duty of insuring "clearness and conciseness in the phraseology and the consistency of statutes" (Conn. Gen. Sts. 1918, sec. 38) corrected it to its present form. Apparently the committee accepted the correction without question. See Conn. Gen. Assembly 1921, File of Bills, No. 93.